Supreme Court, U.S.
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In the

Supreme Court of the United States

LESTER I. TENNEY, *et al.*,
Petitioners,

v.

MITSUI & CO., LTD., MITSUI & CO. (USA), INC., MITSUI MINING CO. LTD., MITSUI MINING USA, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners before this Court are United States citizens who survived slavery and abuse at the hands of Japanese private interests during the years 1941-45.[1] They filed suits in California State courts for lost wages and other relief, relying on the extension of the statute of limitations provided by the California Legislature in its enactment of California Code of Civil Procedure § 354.6.[2]

Respondents removed these actions, and others brought by former prisoners of war, to federal court. In the cases now before this Court, petitions for remand were denied, although some were (properly, in Respondents' view) remanded to the California courts.[3] The cases that remained in federal court were ultimately consolidated by the Judicial Panel on Multidistrict Litigation before the U.S. District Court for the Northern District of California.

The district court dismissed the cases, on the grounds that the 1951 Treaty of Peace with Japan, [1952] 3 U.S.T. 3169, TIAS 2490 ("the Treaty") effectively waived them.

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[1] Respondents' felt need to undermine and denigrate these heroes and the suffering they endured is as offensive as it is inexplicable. There is simply no reason to refer to "the labor [Petitioners] **allegedly** were forced to perform for Japanese corporations," as if the facts were in doubt. Brief of Respondents in Opposition ("Op. Cert."), at 4 (emphasis added).

[2] The text of this statute is set out in the Appendix to the original Petition ("Pet."), at 42a-43a.

[3] Respondents' narrative omits this important fact. Indeed, some of these remanded cases that have now been accepted for review by the California Supreme Court. *Mitsubishi Materials Corp. v. Superior Court*, 130 Cal. Rptr. 2d 734 (2003), *review granted, depublished*, 133 Cal. Rptr. 2d 734 (2003), and *Taiheiyo Cement Corp. v. Superior Court*, 129 Cal. Rptr. 2d 451 (2003), *review granted, depublished*, 133 Cal. Rptr. 2d 734 (2003). While Respondents profess to find the outcome to be a foregone conclusion, the fact is that the State court has not, as of this writing, revoked its determination to resolve these cases.

The district court declined to find merit in Respondents' other arguments, including the contentions that the cases were somehow barred by due process considerations or on the basis of the political question doctrine. The U.S. Court of Appeals for the Ninth Circuit affirmed, albeit for yet another reason: it held that § 354.6, which extended the limitations period for certain actions cognizable in State law, was a substantive, and hence an impermissible, intrusion into the federal government's constitutional prerogative to conduct foreign affairs.

Petitioners respectfully submit that the decision below should be reviewed, and reversed, by this Court for three principal reasons: because there was never federal subject-matter jurisdiction over these claims, which arise under State law and present no federal question; because the proper interpretation of the State statute at issue is the province of the State courts, which currently have this very question before them; and because the Treaty simply does not prohibit the maintenance of these causes of action. Moreover, the cases are of special importance, deriving not only from Petitioners' stature and the scale of the sacrifices they made for their country, but from the constitutional implications of permitting the decision below to stand.

A. This Court's Recent Decision in *Garamendi* Is Entirely Consistent with the Result Urged by Petitioners.

Respondents, in their Brief in Opposition, glibly base their position almost entirely on this Court's recent decision in *American Insurance Association v. Garamendi*, 123 S. Ct. 2374 (2003), as if the Court's disposition of that case virtually rendered this one moot. In fact, however, the reliance on *Garamendi* is misplaced, and the remainder of Respondents' argument is nothing more than repetition and paraphrasing of the opinion of the court below.

The keystone error in Respondents' position is stated in the very first paragraph of their Brief in Opposition. The sentence that is the foundation of their entire argument is the following, which they correctly place at the heart of the

holding of the court of appeals: "The United States exercised ["the core federal power to make and resolve war"] in [the Treaty], which **explicitly precludes** the claims asserted by Petitioners." Op. Cert., at 1 (emphasis added).

This sentence evidences two fundamental misconceptions, which undermine the entire structure of everything that follows. First, **no** constitutional "federal power to resolve war" includes authority for the federal government to waive private individuals' claims against private nationals of the former enemy. Any reading of this Court's opinion in *Garamendi* that supports such an utterly unprecedented result is by necessity incorrect. And second, **nothing** in the Treaty precludes assertion of the claims now before this Court. Respondents' Brief in Opposition hardly deigns to make the untenable argument that the United States as a matter of law may – or that in concluding the Treaty as a matter of fact it did – purport to waive the claims of American citizens against private entities in foreign lands.

Garamendi does not dictate the outcome of the case at Bar. Indeed, the Court declined in that decision to choose between the two theories of preemption included in the various concurring and dissenting opinions in *Zschernig v. Miller*, 389 U.S. 429 (1968). In that case, an Oregon probate statute that discriminated in its treatment of legatees based on their nationality, was held preempted, but the Justices disagreed as to the basis for their holding. *Zschernig* has thus been cited for two rather different propositions over the years: that the entire field of foreign affairs, and anything that touches on it, is exclusively federal terrain, and the States are precluded from legislating in ways that affect that area more than incidentally ("field preemption"); or that State legislation will be barred insofar as it comes into conflict with federal law or treaty ("conflict preemption").

The court below appears to have tacitly embraced the stronger interpretation of this Court's teaching in *Zschernig*. Yet this Court itself has never endorsed such an analysis over the last 35 years. Indeed, after setting out the

different plausible readings of the 1968 decision, Justice Souter's opinion for the Court in *Garamendi* noted that

> [i]t is a fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption evident in the *Zschernig* opinions,

and proceeded expressly to defer resolution of that issue to another day. 123 S.Ct at 2389 (footnote omitted).

In *Garamendi*, this Court found an express conflict between the foreign policy pursued by the Executive branch, through the President and other officials over a period of years, and the consequences of the California State statute at issue. For this reason, it did not matter which reading of *Zschernig* correctly stated the law, since the State legislation was preempted either way.

Here, by contrast, it does matter, since there is no such conflict. The evidence of federal occupation of the field is the Treaty, and the Treaty does not preclude these actions. This is so for the reasons set out in the Petition: among them the limitation of the scope of the Treaty waiver to actions arising "in the course of prosecution of the War," the lack of legal authority (and the utter lack of precedent) for the Executive to waive claims of private Americans against private foreign interests, and the presence of a "most-favored-nation clause" in the Treaty according to which whenever better benefits are extended by Japan to another Allied Power by a subsequent international agreement, those benefits are automatically granted to the parties to the Treaty, including the United States. Thus, in Petitioners' submission, the Treaty does not preclude the maintenance of these private lawsuits, which do not come within the language of its waiver provisions as properly construed.

For these reasons, Respondents may succeed only on a field preemption theory, not on one of conflict preemption. This case, therefore, raises the very question that the majority of the Justices of this Court considered to be worthy

of their consideration in *Garamendi*. Respondents' argument on the conclusive nature of that decision assumes that *Garamendi* in fact answered the question that Justice Souter explicitly deferred. Far from making this Petition moot, that decision of this Court militates strongly in favor of review and reversal of the decision below.

Respondents contend, finally, that these cases are preempted because their maintenance would "interfere with policy choices reflected" in the Treaty. *See*, *e.g.*, Op. Cert. at 13, 15. It is difficult to know how they can state such a thing with such confidence. There is no evidence of record in support of the contention that the drafters of the Treaty, or its sponsors in the United States Senate, made an affirmative "policy choice" to sacrifice the private right of Americans to sue private Japanese tortfeasors for wrongful acts that took place during wartime but not "in the course of the prosecution of the War." Indeed, there is substantial evidence of the contrary proposition. *See* Pet., at 13-22.

Moreover, legislation and treaties do not typically take away the rights of Americans through the "reflection" of "policy choices." There is simply no case in the history of this land in which a treaty has purported to take away "national-vs.-national" claims, much less to do so through something so ephemeral as unarticulated "policy choices."

Respondents purport to rise to the challenge of finding a single instance since 1789 in which this has happened by citing, not a peace treaty, not a multilateral convention, but . . . a single line in the opinion of this Court in *Garamendi*. Op. Cert., at 14-15. In that context, however, the Court went no further than to note that "wartime claims against **even nominally private** entities have become issues in international diplomacy," 123 S. Ct. at 2387 (emphasis added). While this statement is clearly true, it falls far short of finding constitutional authority, or historical precedent, for the Executive to negotiate away the private claims of Americans against private foreigners.

In this case, furthermore, Respondents are not merely "nominally private": they were and are private in all senses, as witness the discussion of that key distinction by this Court in *Kawakita v. United States*, 343 U.S. 717 (1952).

As Petitioners have pointed out, finally, there is no basis to believe that the "policy choices" of the Executive were any different, in respect to the remedies to be made available to potential private litigants, in the European and Pacific Theaters of World War Two. Yet, in resolving private disputes between Holocaust victims and German nationals, the Executive concluded that it had no authority to waive private claims or to insist that their owners do so. *See* Pet., at 28-30. It is impossible to conceive why, in an area in which the Executive is powerless to act through formal means, its vague expression of "policy choices" should have preclusive effects on the rights of Americans.

B. Respondents' Invocation of Federal Question Jurisdiction Is Improperly Based on the Contents of the Answers in These Cases, Not of the Complaints.

Respondents continue to insist that, somehow, even without their incorrect interpretation of *Garamendi*, federal questions are presented by these cases in a way sufficient to invoke the jurisdiction of the federal courts pursuant to 28 U.S.C. § 1331. But that is simply not true. No federal questions are set out in the complaints, and no federal questions need to be resolved in order to dispose of them. What federal issues arise here are contained in Respondents' answers and in the motions to dismiss.

If the "well-pleaded complaint rule" means anything, it means that federal subject matter jurisdiction cannot come about in this manner.[4] And this Court has not stepped back from the classic articulation of the rule in *Caterpillar, Inc. v.*

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[4] Respondents also contend that there is complete diversity in one of the consolidated POW cases: *Dunn v. Nippon Steel Corp., et al.* (9th Cir. No. 01-17157). *See* Op. Cert., at 23-24. But whether there really is diversity in the *Dunn* case has never been determined by any court in these proceedings, and certainly may not be taken as established.

Williams 482 U.S. 386, 392 (1987): "To bring a case within [28 U.S.C. § 1331], a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, **of the plaintiff's cause of action**" (emphasis added) (quoting *Gully v. First Nat'l Bank*, 299 U.S. 109 (1936)). Nor, contrary to Respondents' submission, was that long line of precedent tacitly reversed in *Verizon Maryland, Inc. v. Public Service Comm'n*, 122 S. Ct. 1753, 1758-59 (2002). Op. Cert., at 28. In *Verizon*, the question was whether the plaintiff had properly pleaded a private right of action under a federal statute, which this Court opined was itself a question "arising under" federal law within 28 U.S.C. § 1331. Nothing in that opinion suggests that a federal defense to a State law claim is sufficient to ground a finding of federal question jurisdiction.

As noted in the discussion of *Garamendi*, *supra*, Petitioners recognize that there exists a "complete preemption doctrine," under which there are certain areas of the law so federal in their character that any complaint, however artfully framed, must inevitably raise a federal question. Yet in making their argument that the subject matters of the complaints now before the Court are subject to this doctrine, Respondents continue to show an odd reluctance to indicate exactly which area they contend to have been completely preempted by federal activity.

Respondents submit that "the Treaty and the War Claims Act [of 1948, 50 U.S.C. App. § 2001 *et seq.*] completely preempt World War II claims against Japan and its nationals." Op. Cert., at 24-25. By this they appear to mean that the Treaty and the statute preclude any suit by **any** American against **any** Japanese national regarding **any** event or any alleged wrong that occurred during the War years. But such a reading is entirely inconsistent with the very language of the Treaty itself. The Treaty does not even purport to waive claims of private Americans against private Japanese interests that happened to have arisen between

1941 and 1945. Rather, the carefully negotiated language of Article 14(b) extends only to

> all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals **in the course of the prosecution of the war**, and claims of the Allied Powers for direct military costs of occupation.

Treaty, Article 14(b), Pet. at 99a.

At most, Respondents might be able to argue that there is complete federal preemption as to claims arising out of the conduct of Japanese nationals "in the course of the prosecution of the war." But they cannot demonstrate that the actions at issue here come within that limiting language.

There is no basis for the conclusion of the court below, which Respondents urge on this Court: that all causes of action, including those belonging to private American citizens who allege that they were injured at the hands of private Japanese nationals, "relating to the War" were taken away, without lawful authority, precedent, or even express and contemporaneous acknowledgment.

In furtherance of their effort to "federalize" Petitioners' claims, Respondents continually assault a position that Petitioners have never taken. Throughout their Brief in Opposition, in parallel to their incorrect contention that the Treaty bars (or even "explicitly precludes," Op. Cert. at 1) these causes of action, they uncontroversially insist that "[t]he Treaty does not create – expressly or otherwise – a private right of action against Japan or its nationals, nor does it authorize any State of the United States to create such a right." *See, e.g.*, Op. Cert. at 5.

But no party to these cases has attempted to locate a cause of action in the Treaty. The point is not that the Treaty is the source of Petitioners' right to sue those who enslaved them. It is that the Treaty did not take that preexisting right away. That right exists by virtue of the common law of the

States, and in this case of California in particular, which States retain the authority to prescribe the procedures, including the time limits, within which it may be exercised. And that is the authority exercised by the California Legislature in enacting § 354.6.

C. Respondents' "Alternate Theories" Supposedly Supporting the Decision Below Are of No Relevance to the Issues Presented Here.

Respondents propose that, even if the decision of the court of appeals is wrong in its express resolution of the cases below, this Court should still not intervene because the lower court might have reached the same conclusion through other routes. In particular, they submit that the cases might have been dismissed on due process grounds, or by virtue of the political question doctrine.

No judge to whom Respondents have ever attempted these arguments, however, has bought them. It is unclear even now just what right to due process Respondents feel to have been denied by a proper interpretation of § 354.6. Nor can they plausibly argue that it is unfair to hold Respondents to the strictures of California substantive law, when all that law provides of relevance to this case is that laborers should be paid the fair value of their work, and should not be subjected to torture. It is hardly unfair to subject anyone under any imaginable circumstances to that standard, whose application in the facts of this case cannot with a straight face be called "arbitrary or unfair." Op. Cert., at 21, citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981).

Moreover, the claim that a law extending limitations periods after the fact is itself unconstitutional as *ex post facto* legislation is without support. The learned historical analyses of this Court in *Stogner v. California*, 123 S. Ct. 2446, 2450-56 (Breyer, J.), and 2462-69 (Kennedy, J., dissenting), agree on one thing: the constitutional prohibition is against *ex post facto* criminal prosecutions. There is no comparable rule regarding the extension of limitations periods within which to bring civil actions.

Indeed, this Court has expressly rejected the very argument Respondents make, stating that "a statute of limitations . . . can be extended, without violating the Due Process Clause, after the cause of action arose **and even after the statute itself has expired**." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 229 (1995) (emphasis added).

Nor can Respondents' characterization of Petitioners' cause, in the context of presenting their argument on the political question doctrine, be permitted to go unchallenged. Respondents say that the former Prisoners of War "seek nothing less than a judicial reexamination of policy decisions made half a century ago, pursuant to which Japan became and continues to be a vital ally of the United States." Op. Cert., at 22. This is, of course, nothing to do with what Petitioners seek. There are no policy decisions to examine: there are common law rights to adjudicate. Since there never was a decision made by competent authorities to strip these Petitioners of their rights to pursue justice against those who tortured them, who abused them, and who stole the fruits of their labor without compensation, adjudication of these cases would pose no threat to the standards laid down by this Court in *Baker v. Carr*, 369 U.S. 186 (1962).

Trying cases involving facts that occurred long ago and far away may be difficult from a practical perspective, but such actions are not excluded for that reason from the competence or the jurisdiction of the judiciary. Neither does the fact that foreign governments, or even our own, may be made uncomfortable by the light that our judiciary casts into the dark corners of such cases bear on the power, much less on the obligation, of our Courts to hear legally cognizable controversies properly laid before them.

Neither due process concerns nor the political question doctrine bars consideration of these cases.

Conclusion

For all of the foregoing reasons, as well as for those set out in the Petition and in the Briefs of the *Amici* supporting Petitioners, a writ of certiorari should issue.

Respectfully submitted,

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